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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,
Petitioners,
v.
PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN SUPPORT OF RESPONDENTS

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BRIEF AMICUS CURIAE FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF AMICUS CURIAE

The Associated General Contractors of America, Inc. ("AGC") is a private, nonprofit trade association founded in 1918 to represent the national interests of general construction contractors and other firms associated with the construction industry.[1] AGC has 101 state and local chapters, with at least one chapter serving the general contractors and related firms in each state, and one chapter in Puerto Rico. AGC's members range from small, family-owned businesses to the largest contractors in the country. Collectively, AGC members perform the major-

[1] This brief is filed with the consent of the parties. Copies of the consent letters have been filed with the Clerk.

ity of the construction of public, commercial, and residential buildings, highways, bridges, industrial and defense facilities, and municipal utilities in the United States.

This case concerns whether and, if so, how the antitrust laws apply to multi-employer groups exercising their collective bargaining rights under the Nation's labor laws. Although the resolution of that question will have profound implications throughout the economy, the Court has chosen to examine the issue in the narrow and atypical context of professional sports. Neither petitioners nor the amici outside the arena of professional sports that have chosen to appear to support them are representative of the numerous segments of the economy that will be affected by this Court's decision. *See, e.g.*, Brief of Amici Curiae the Screen Actors Guild, Inc., *et al.* in Support of Petitioners ("Br. of Amici SAG"). Tellingly, even the brief filed by the Solicitor General was signed only by the Antitrust Division and the Federal Trade Commission in addition to the Solicitor General—not the usual sources within the Federal Government for guidance on important questions directly affecting the Nation's labor laws. *See* Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioners ("Gov't Br.").

The construction industry is more broadly representative of the many unionized segments of the national economy than is either the professional sports or the entertainment businesses. Standing alone, the unionized segment of the construction industry accounts for some $265 billion in annual revenues, or about four percent of the national economy, and exists in every region of the country. Many of AGC's chapters have been and remain the vehicle for multi-employer collective bargaining with construction and building trade unions. AGC has been involved in such multi-employer bargaining for decades.

AGC's assessment of the practical consequences for multi-employer bargaining if the decision below is reversed will provide the Court with a broader perspective on the effect and implications of imposing antitrust liability upon multi-employer bargaining groups than the views provided by petitioners and their supporting amici. AGC is concerned that imposing antitrust liability upon multi-employer bargaining groups for exercising their right to unilaterally implement a good faith bargaining offer at the point of impasse will substantially impair multi-employer bargaining in the construction industry. AGC believes that, faced with the prospect of such liability, many employers will opt to bargain individually. This will destabilize the collective bargaining process. For many decades, multi-employer bargaining has been the starting point for almost all collective bargaining in the construction industry. Destabilizing that foundation would not serve the interests of either employers or unions.

SUMMARY OF ARGUMENT

The question before the Court in this case—whether and, if so, how the antitrust laws apply to multi-employer collective bargaining—transcends the narrow and atypical factual context in which it is presented. If adopted, the sweeping conclusions urged by petitioners and their supporting amici would extend to multi-employer bargaining in all industries, regardless of their economic and competitive structure. This would impair multi-employer bargaining where it has proved most effective in promoting labor peace and stability—in the more typical industries such as construction. This result not only would be detrimental to the thousands of employers and millions of workers nationwide who benefit from multi-employer bargaining arrangements, but also cannot be squared with the congressional policies underlying either the labor or antitrust laws.

In the more typical industries such as construction, there are literally thousands of different multi-employer

bargaining units at the local, state, and regional level. These units consist of anywhere from two to dozens of employers who have banded together to take advantage of the multi-employer collective bargaining process. Most of the bargaining between these multi-employer groups and the unions with which they deal concerns "mandatory subjects" such as wages and benefits. 29 U.S.C. § 158 (d). Employers benefit from multi-employer bargaining by being able to pool their resources and to reach agreements establishing the terms of and assurances for the employment of a usually dispersed and often large workforce.

Unions and their members, on the other hand, benefit from multi-employer bargaining because it enables them to reach area-wide agreements over employment terms and conditions with a large number of employers, thereby reducing the likelihood that particular employers will use labor costs as a competitive weapon in seeking business. In addition, unions are able to secure important benefits—including health insurance, pension plans, and hiring halls —that they would not be able to obtain from many employers on an individual basis. This is particularly important in the construction industry, because it enables the often transient workforce to move from one job (and employer) to another without having to negotiate new wage rates or to sacrifice long-term benefits.

But the benefits of multi-employer bargaining transcend the particular parties and interests involved. As this Court has recognized, history teaches that multi-employer bargaining has been a "vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 95 (1957). Even with the best of intentions, the bargaining process sometimes breaks down. Congress has recognized that both labor and management have a number of potent economic weapons that may be exercised in an effort to break impasse and to secure each side's respective aims.

These weapons are "part and parcel" of the collective bargaining process under the labor laws. *NLRB* v. *Insurance Agents Int'l Union*, 361 U.S. 477, 489 (1960). They include the right of employers to unilaterally impose good faith bargaining proposals after impasse.

Subjecting multi-employer groups to liability under the antitrust laws for exercising these weapons would undermine national labor policy because it would destabilize the collective bargaining process and ultimately deter multi-employer bargaining altogether. The result would be increased labor unrest. At the same time, the national policy underlying the antitrust laws—promotion of business competition—would not be materially advanced. The Clayton Act unambiguously exempts restraints on competition in "human labor" from the Sherman Act's reach. 15 U.S.C. § 17. This Court, moreover, has long recognized that the antitrust laws are aimed at restraints on the *product*—not labor—market. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940). In this case, all agree that the challenged restraint affects only the *labor* market. Traditional antitrust concerns simply are not implicated.

Where, as here, restraints on human labor are concerned, there is no conflict between the Nation's labor and antitrust laws. The Clayton Act resolved that. But, even so, a proper accommodation of the policies underlying the labor and antitrust laws compels the conclusion that multi-employer bargaining groups are immune from antitrust liability for exercising their collective bargaining rights where, as here, the challenged conduct places no restraint on competition in a product market. This result is supported by the application of settled canons of statutory construction and principles of sound judicial decision-making. The antitrust laws were never intended—and should not now be read—to provide a vehicle for federal court intervention into basic labor disputes. Congress has established a different regime for resolving such disputes: effective collective bargaining on an individual- or multi-employer basis with resort as needed to the economic

weapons at each side's disposal and to administrative remedies. The judgment below should be affirmed.

ARGUMENT

I. MULTI-EMPLOYER BARGAINING HAS BEEN CRITICAL TO THE SUCCESS OF COLLECTIVE BARGAINING AND TO LABOR PEACE AND STABILITY IN THE CONSTRUCTION AND OTHER INDUSTRIES.

1. Multi-employer bargaining is an age-old and commonplace practice. *See Charles D. Bonanno Linen Serv., Inc.* v. *NLRB*, 454 U.S. 404, 409-410 & n.4 (1982); Clarence E. Bennett, *Employers' Associations in the United States: A Study of Typical Associations* 21 (1921) (hereinafter, "*Employers' Associations*"). In enacting the Taft-Hartley amendments in 1947, Congress specifically rejected proposals to "limit or outlaw multi-employer bargaining," noting that there was " 'cogent evidence that in many industries multi-employer bargaining * * * was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining.' " *Charles D. Bonanno Linen Serv.*, 454 U.S. at 409 (citing *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 95 (1957) ("*Buffalo Linen*")).

As this Court has recognized, the advantages of multi-employer bargaining are numerous and accrue to the benefit of both labor and management:

> Multiemployer bargaining * * * enables smaller employers to bargain "on an equal basis with a large union" and avoid "the competitive disadvantages resulting from non-uniform contractual terms." * * * At the same time, it facilitates the development of industry-wide, worker benefit programs that employers otherwise might be unable to provide. More generally, multi-employer bargaining encourages both sides to adopt a flexible attitude during negotiations; * * * employers can make concessions "without fear

> that other employers will refuse to make similar concessions to achieve a competitive advantage," and a union can act similarly "without fear that the employees will be dissatisfied at not receiving the same benefits which the union might win from other employers." Finally, by permitting the union and employers to concentrate their bargaining resources on the negotiation of a single contract, multiemployer bargaining enhances the efficiency and effectiveness of the collective bargaining process and thereby reduces industrial strife. [*Charles D. Bonanno Linen Serv.*, 454 U.S. at 409-410 n.3 (citations omitted).]

Today, employers in many typical American industries routinely organize into multi-employer units for the purpose of negotiating local, state, and national labor agreements with the unions representing their employees. *See, e.g., NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981) (mining); *Buffalo Linen*, 353 U.S. 87 (trucking); *Connell Constr. Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975) (construction). In many respects, multi-employer collective bargaining in the construction industry exemplifies the dynamics of such bargaining.

2. The construction industry is comprised of a large number of general contractors and specialty subcontractors operating on the national, state, and local levels. There are approximately 140,000 collective-bargaining contractors nationwide. The large majority of these contractors operate under one or more of the more than 4,200 labor agreements negotiated on a multi-employer basis. Many of these contractors employ a variety of union members from different trades. In the absence of multi-employer groups, these tradesmen would be unable to secure important employment benefits—including pension plans, health insurance plans, and hiring halls—which smaller employers are unable to provide on an individual basis and which tradesmen would forfeit as they changed employment from one contractor to another.

This is of critical importance to the often transient workforce in the construction industry.

Multi-employer bargaining within the construction industry takes place on many different levels. The AGC, through its chapters, bargains on behalf of general contractors on both the state and local levels. There are, however, a multitude of other organizations through which various specialty contractors engage in multi-employer bargaining. The size of these groups ranges from two to dozens of contractors, depending upon the size of the industry and the territory covered. Moreover, bargaining is conducted not only on a trade-by-trade basis within the industry, but competing associations of employers of a particular trade in the same region often negotiate separate collective bargaining agreements with the same trade unions.[2]

Multi-employer bargaining in the construction industry typically centers around the so-called "mandatory subjects," *i.e.*, "wages, hours and other terms and conditions of employment." 29 U.S.C. § 158(d). Absent union consent, employers in the construction industry, like those in all other industries, are prohibited by federal law from attempting to negotiate wage and other mandatory terms with union-represented employees on an individual basis. *Id. See Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678, 683 (1944). It is on these subjects that employees and employers in the construction industry are most eager to reach agreement on a collective basis. As a result, collective bargaining agreements in the construction industry typically establish specific wage rates, benefits, and other conditions of employment, which apply to *all* employees performing the same work.

Multi-employer bargaining has proved vital to the promotion of industrial peace and stability in the con-

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[2] For example, road building and underground contractors might form into separate multi-employer groups and bargain separate agreements with a union of heavy equipment operators.

struction industry. One of the fundamental objectives of the building and construction trade unions is to equalize the terms and conditions of employment among construction contractors so that contractors cannot use the cost of labor as a weapon in competition for business. Multi-employer bargaining is essential to the unions' ability to achieve that end, because it enables unions to negotiate standard, area-wide labor agreements with numerous contractors. This, in turn, permits unions—as well as contractors—to adopt a more flexible approach to collective bargaining, because it enables them to take positions without fearing that they may be compromising their bargaining power vis-à-vis particular parties.

Multi-employer bargaining also offers practical advantages to its participants. There can be literally hundreds of contractors in a particular geographic area. It is extremely costly and time-consuming for construction trade unions to negotiate with contractors individually; the existence of multi-employer bargaining groups obviates that problem.[3] Contractors favor bargaining in multi-employer groups for the same reason. Engaging in multiple negotiations with different construction trade unions on an individual basis simply would be beyond the resources available to many contractors. Thus, contractors, like unions, find it efficient to band together and share the cost of bargaining an agreement that will be applied to all.

3. The economic structure and nature of collective bargaining in the professional sports and entertainment industries differ from this typical pattern in fundamental respects. The professional sports industry is characterized by a relatively small number of employers who band together to negotiate industry-wide labor agreements that

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[3] For these and other reasons, it is not surprising that *none* of the traditional building trade unions has filed a brief supporting petitioners.

establish only the minimum framework of employment terms. There is an inevitability to this multi-employer action—not present in other industries, including construction—because of the need to establish common, industry-wide ground rules for all employers, or teams, so that "league play" may take place. Moreover, unlike virtually all other industries, the employees in the professional sports and entertainment industries have sought and secured through collective bargaining the opportunity to engage in individual bargaining over wage terms, because of the wide disparity in talent among individual employees affecting salaries in those particular industries. Br. of Amici SAG at 4; Pet. Br. at 7.

II. SUBJECTING MULTI-EMPLOYER BARGAINING GROUPS TO ANTITRUST LIABILITY FOR EXERCISING THEIR COLLECTIVE BARGAINING RIGHTS WOULD DESTABILIZE THE COLLECTIVE BARGAINING PROCESS AND UNDERMINE THE NATIONAL LABOR POLICY OF PROMOTING INDUSTRIAL PEACE AND STABILITY.

1. As this Court has recognized, "the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management" is "central" to the advancement of a "fundamental aim" of the national labor laws—"the establishment and maintenance of industrial peace." *First Nat'l Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 674 (1981); 29 U.S.C. § 151 ("encourag[ing] the practice and procedure of collective bargaining"). While the ultimate aim of collective bargaining is of course agreement, negotiations often reach "impasse" before that goal is attained. Impasse is, in fact, a "recurring feature in the bargaining process * * * 'which in almost all cases is eventually broken, through either a change of mind *or the application of economic force.*'" *Charles D. Bonanno Linen Serv.*, 454 U.S. at 412 (citation omitted and emphasis added).

Both labor and management have numerous economic weapons at their disposal to break impasse and pursue their respective aims. *First Nat'l Maintenance Corp.*, 452 U.S. at 675. For example, unions may strike, *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 14 (1962), and employers may lock out employees. *American Ship Bldg. Co.* v. *NLRB*, 380 U.S. 300, 310-311 (1965). *See Charles D. Bonanno Linen Serv.*, 454 U.S. at 415-416 n.9, 417 n.10. As this Court has recognized, "[t]he use of economic pressure * * * is of itself not at all inconsistent with the duty of bargaining in good faith." *NLRB* v. *Insurance Agents Int'l Union*, 361 U.S. 477, 490-491 (1960). To the contrary, it is "part and parcel" of the collective bargaining process established by the national labor laws. *Id.* at 489.

The right to unilaterally impose terms based on good faith bargaining proposals after impasse is an entirely proper and long-recognized weapon in management's arsenal. *See Laborers Health & Welfare Trust Fund for N. Cal.* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.5 (1988); *Charles D. Bonanno Linen Serv.*, 454 U.S. at 415-416 n.9; *American Ship Bldg. Co.*, 380 U.S. at 308; *NLRB* v. *Katz*, 369 U.S. 736, 744-746 (1962).[4] Of course, as will always be the case in determining whether to exercise the economic weapons at each

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[4] The Courts of Appeals also have recognized the existence of this long-standing collective bargaining right. *See, e.g., Rivera-Vega* v. *Conagra, Inc.*, 70 F.3d 153, 161 (1st Cir. 1995); *NLRB* v. *WPIX, Inc.*, 906 F.2d 898, 900 (2d Cir.), *cert. denied*, 498 U.S. 911 (1990); *Moldovan* v. *Great Atlantic & Pac. Tea Co.*, 790 F.2d 894, 900 (3d Cir. 1986), *cert. denied*, 485 U.S. 904 (1988); *AMF Bowling Co.* v. *NLRB*, 63 F.3d 1293, 1299 (4th Cir. 1995); *United Steelworkers of Am.* v. *Asarco, Inc.*, 970 F.2d 1448, 1452 (5th Cir. 1992); *NLRB* v. *Plainville Ready Mix Concrete Co.*, 44 F.3d 1320, 1325 (6th Cir.), *cert. denied*, 116 S. Ct. 474 (1995); *NLRB* v. *Transport Serv. Co.*, 973 F.2d 562, 567 (7th Cir. 1992); *NLRB* v. *Unbelievable, Inc.*, 71 F.3d 1434, 1440 (9th Cir. 1995); *United Paperworkers Int'l Union* v. *International Paper Co.*, 920 F.2d 852, 857 n.5 (11th Cir. 1991); *Local Union No. 47, Int'l Bhd. of Elec. Workers* v. *NLRB*, 927 F.2d 635, 642 (D.C. Cir. 1991).

side's disposal, the decision to unilaterally impose new terms after impasse must be carefully made with an eye toward its likely effect on the dynamics of the bargaining process. But our labor laws are premised on the belief that "collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole." *First Nat'l Maintenance Corp.*, 452 U.S. at 678 (citations omitted).[5]

Moreover, unilateral imposition following impasse is, of course, not the end of the story. The parties remain under a continuing obligation to bargain in good faith. *See* 29 U.S.C. § 158(d). And, in the more typical industries such as construction, experience teaches that—even after impasse and the exercise of economic weapons at the parties' disposal—a new collective bargaining agreement ultimately will be reached. Denying multi-employer groups their collective bargaining right to unilaterally impose new terms at impasse would undermine, and not facilitate, that process.

2. Subjecting multi-employer bargaining groups to potential antitrust liability for exercising their collective bargaining rights would have a destabilizing effect on the collective bargaining process in the construction industry by tipping the current economic balance dramatically in favor of union employees. This, in turn, would be almost certain to result in less multi-employer collective bargaining, to the detriment of both contractors and trade unions. *See supra* at 8-9.

In the construction industry, as in other typical industries, both management and labor have effective economic weapons at their disposal. The strike, in particular, is a

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[5] As even the government is forced to concede, the national labor laws "focus[] on the bargaining *process*, rather than the result of that process * * *." Gov't Br. at 22 (emphasis added). For this reason, petitioners' argument that antitrust immunity should attach only when a collective bargaining *agreement* is reached is misplaced.

potent weapon for construction trade unions. Contractors operate under tight time constraints in completing their projects, and construction unions generally exercise tight control of the skilled labor they represent. As a result, it is extremely difficult for collective bargaining contractors to continue operations during strikes and, in practice, very few attempt to do so. Construction unions are, of course, cognizant of this leverage and at times apply it to avoid the imposition of undesirable employment terms and conditions.

Multi-employer contractor groups, on the other hand, whose members believe they cannot compete under terms or conditions proposed by unions during the collective bargaining process, may, upon reaching impasse, implement new terms contemplated in their prior good faith bargaining proposals. This, too, can be an effective tool to break impasse. The result, in practice, has been a relatively even balance of economic power. Subjecting multi-employer groups to the prospect of treble damages under the antitrust laws for exercising their collective bargaining rights would fundamentally disrupt that balance.

According to petitioners, upon impasse, each individual member of a multi-employer bargaining group would still be permitted to implement pre-impasse terms without fear of reprisal under the antitrust laws, as long as it did so individually and not collectively. This is scant comfort. At least where employers had bargained collectively on a multi-employer basis and reached consensus on the terms of a particular offer to the union, any post-impasse implementation of that offer by the same employers—on an "individual" basis—would subject the employers to a very real threat of antitrust liability if petitioners prevail here. It is only natural to presume that unions, with that threat at their disposal, will exert it in the bargaining process.

Nor is it realistic to expect, as petitioners also suggest, that in "the more traditional bargaining context"

labor organizations which seek "standardized industry-wide terms" on a multi-employer basis will agree to relieve those employers of any fear of potential antitrust liability for post-impasse implementation. Pet. Br. at 39. Both common sense and human nature suggest that this valuable antitrust "trump card" would *not* be surrendered, or would be surrendered only at a prohibitive cost to employers.

Virtually all segments of American industry that bargain on a multi-employer basis for industry-wide terms are well served by the established ground rules. Indeed, the reason there has been no "significant antitrust challenge to date" in that context, as petitioners put it, *id.*, is that it has long been assumed that the post-impasse implementation rules pertaining to individual bargaining apply with equal force to multi-employer bargaining. If the Court adopts the dichotomy urged by petitioners, the tradition of multi-employer bargaining in American industry will be only of historical interest.

In the process, many of the advantages of multi-employer collective bargaining will be lost or significantly diminished. It will be more difficult for employees to obtain long-term benefits and assurances of employment. The costs to trade unions and contractors in resources and time will be substantially multiplied due to the duplication of effort involved in bargaining on an individual basis. And, in the absence of multi-employer bargaining, there is certain to be an increase in labor unrest, as trade unions resort to pattern bargaining techniques and "whipsaw" strikes in order to obtain uniform contract terms for all construction employers, which heretofore had been obtained through multi-employer bargaining. *See Buffalo Linen*, 353 U.S. at 90 n.7. All of this is in direct conflict with the Nation's long-standing policy of promoting labor peace and stability through effective collective bargaining, including multi-employer collective bargaining. *See id.* at 94-96.

3. Given the factual context in which this particular case arises, petitioners and their supporting amici direct their arguments to atypical concerns—allegedly present in the professional sports and entertainment industries—of employer "cartels" exercising monopsony power to restrain competition in their markets for labor. These conditions do not exist in the construction industry—or, for that matter, in most of American industry—and therefore should not serve as the practical underpinnings for the Court's resolution of the broad question presented in this case.

As discussed, there is an inevitability to the maintenance of multi-employer bargaining groups in professional sports that is not present in the construction industry, in which multi-employer groups historically have formed in response to the exercise of union power. As a result of the inherent need for multi-employer action on an industry-wide basis in the professional sports context, employers may be forced to risk potential antitrust liability by engaging in multi-employer collective bargaining in the event petitioners' position prevails. Employers in the construction industry, on the other hand, are not constrained by these forces and undoubtedly will find the risk of potential antitrust liability unacceptable.

In addition, while Amici SAG discount the effectiveness of the "strike threat" in the entertainment industry, it remains a particularly potent economic weapon in the construction industry today. *See supra* at 12-13. Thus, even accepting petitioners' assertions about the balance of power in the professional sports and entertainment industries, there is no reason to suppose that the dynamics of those idiosyncratic industries are replicated more generally throughout the country, and in fact they are not.[6]

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[6] Even so, petitioners are far from powerless to combat the unilateral imposition of new terms given the traditional economic weapons and other remedies available to them. *See* Pet. Br. at 42. Petitioners retain the same collective bargaining rights that every other group of represented employees has. Thus, in addition to their

In fact, petitioners here have sought application of the antitrust rules to their own, peculiar form of multi-employer collective bargaining because their own union chose to insist upon—and to secure through collective bargaining—the opportunity for its members to negotiate wages on an individual basis. As discussed, however, the negotiation of wages on an individual basis is the exception rather than the rule in multi-employer bargaining, and is confined to the few industries in which there is a widespread disparity in individual talent affecting salaries. *See supra* at 8, 10.

This unique and relatively atypical set of circumstances —affecting only the small fraction of American workers blessed with the talent necessary to compete in professional sports or the attributes necessary to secure employment in the entertainment industry—simply should not provide the driving force for the rule of law that will be announced in this case, which will affect millions of workers nationwide (including those in the construction industry), whose union representatives and employers rou-

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right to withhold their "unique" and "skilled" services, they possess the traditional remedy before the National Labor Relations Board ("NLRB") for the improper implementation of an employer's "final offer"—filing a bad faith bargaining charge under Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5). *See First Nat'l Maintenance Corp.*, 452 U.S. at 674 (discussing the role of the NLRB in resolving collective bargaining disputes). As evidenced by the recent baseball strike, that remedy can be a powerful weapon against multi-employer bargaining groups that elect to implement good faith bargaining proposals post-impasse. In this case, petitioners never even sought to invoke that remedy. *See* Pet. Br. at 10-11.

Moreover, union members also have a cause of action against their collective bargaining representative for breach of the duty of fair representation. *See Air Line Pilots Ass'n* v. *O'Neill*, 499 U.S. 65, 74 (1991); *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967). Among other things, that duty requires a collective bargaining representative "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion * * * with complete good faith and honesty, and to avoid arbitrary conduct." *Air Line Pilots Ass'n*, 499 U.S. at 76.

tinely bargain over *all* mandatory terms and conditions of employment on a multi-employer basis, and who have been well-served by the current dynamics of the multi-employer collective bargaining process.

III. SUBJECTING MULTI-EMPLOYER GROUPS TO ANTITRUST LIABILITY FOR EXERCISING THEIR COLLECTIVE BARGAINING RIGHTS WOULD NOT MATERIALLY ADVANCE THE NATIONAL ANTITRUST POLICY OF PROMOTING BUSINESS COMPETITION IN PRODUCT MARKETS.

1. The Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Given the breadth of its textual reach, there was immediate confusion following the passage of the Act concerning its application to certain organized labor activities. Courts soon entered the fray and "enjoined strikes as unlawful restraints of trade when a union's conduct or objectives were deemed 'socially or economically harmful.'" *H.A. Artists & Assocs.* v. *Actors' Equity Ass'n*, 451 U.S. 704, 713 (1981) (citation omitted). Congress responded in 1914 with the Clayton Act. *Id. See United States* v. *Hutcheson*, 312 U.S. 219, 229-230 (1941). Section 6 of that Act unequivocally declares that: "The labor of a human being is not a commodity or article of commerce." 15 U.S.C. § 17.[7]

Under a plain reading of Section 6, organized practices that restrain only the *labor* market, including those alleged by petitioners here, cannot amount to a "restraint of trade

[7] Section 6 further immunizes unions and their members from antitrust liability for "lawfully carrying out" their "legitimate object[ives]." 15 U.S.C. § 17. Section 20 of the Clayton Act sought to address the problem of federal court intervention into labor disputes by prohibiting federal court injunctions of "dispute[s] concerning terms or conditions of employment," except in limited circumstances. *See* 29 U.S.C. § 52, discussed *infra* at 23.

or commerce" within the Sherman Act. *Cf. Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 724 (1965) (Goldberg, J.) ("if one thing is clear, it is that Congress has repudiated the view that labor is a commodity" within the meaning of the antitrust laws); *Kennedy* v. *Long Island R.R.*, 319 F.2d 366, 373 (2d Cir.) (summarily rejecting argument that multi-employer bargaining unit was subject to antitrust liability for restraint on labor market based on plain reading of Section 6), *cert. denied*, 375 U.S. 830 (1963). Under settled canons of statutory construction, that plain meaning must be given effect. *See Connecticut Nat'l Bank* v. *Germain*, 112 S. Ct. 1146, 1149 (1992).[8]

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[8] The government urges the Court to disregard the clear import of Section 6's first sentence, because the next sentence is "aimed at *employees'* organizations such as unions, and the legislative history of the Clayton Act gives no indication that Congress intended to immunize *employers'* unilateral * * * combinations in restraint of labor markets." Gov't Br. at 12 n.4 (emphasis in original). But there is absolutely no basis—in the legislative history or elsewhere—for concluding that giving effect to the plain meaning of Section 6 would *contravene* Congress' intent in enacting the Clayton Act. *See* Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 Geo. L.J. 19, 34-58 (1986). Either Congress simply did not foresee that employees would argue that *employers* should be treated differently under the antitrust laws, or Congress presumed that it had resolved that issue by unambiguously exempting restraints in "human labor" from the Sherman Act altogether. Neither result would provide any basis for disregarding the plain meaning of Section 6's first sentence. *See Union Bank* v. *Wolas*, 502 U.S. 151, 158 (1991) ("The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning") (citing *Toibb* v. *Radloff*, 501 U.S. 157, 164 (1991)). Moreover, if Congress had intended to exempt organized employee conduct only, as the government submits, passage of Section 6's second sentence —alone—would have sufficed.

The government also erroneously suggests that a plain reading of Section 6 cannot be squared with prior decisions of this Court. Gov't Br. at 12 n.4. This Court has never directly addressed the argument

Thus, Section 6 of the Clayton Act should foreclose the argument that multi-employer groups may be subjected to antitrust liability for alleged restraints affecting only the labor market. Simply put, restraints on the *labor* market are not restraints on *commerce* within the reach of the Sherman Act. At a minimum, Section 6 evinces a clear congressional intent that the policy motivating the Nation's antitrust laws is not squarely implicated in the case of concerted restraints on labor.

2. This Court, too, has long recognized that restraints on the labor market do not implicate traditional antitrust concerns. The seminal case is *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940). There, the Court held that the Sherman Act prohibits only restraints affecting "commercial competition in the marketing of goods or services," 310 U.S. at 495—*i.e.*, the product market—and that unions are not subject to antitrust liability when they seek merely to further their own interests via the labor market. *Id.* at 499, 500-501. *Accord, H.A. Artists & Assocs.*, 451 U.S. at 715 n.16. The Court's subsequent decisions have faithfully applied *Apex Hosiery*'s product market/labor market distinction in determining whether challenged restraints arising in the labor context implicate antitrust concerns.[9] In this case, all agree that the chal-

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presented here. Nevertheless, as discussed below, the Court's prior precedents support, rather than conflict with, a plain reading of Section 6 because they recognize a product market/labor market distinction in determining whether challenged restraints are subject to the Sherman Act's reach. The challenged restraint in *Radovich* v. *National Football League*, 352 U.S. 445, 448-449 (1957) —an alleged conspiracy to monopolize professional football and destroy a competitive league—had significant potential adverse effects on the product market, and therefore did not fit squarely into Section 6's labor exemption from the Sherman Act. Moreover, unlike this case, *Radovich* did not involve a *unionized* labor market. Thus, the full force of the labor laws governing collective bargaining was not brought to bear.

[9] *See, e.g., Allen Bradley Co.* v. *Local Union No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 810 (1945) (union action in

lenged restraint affects only the labor—and not product—market. Therefore, traditional antitrust concerns are not implicated.

3. Consistent with this understanding, the Court has held that labor-management disputes over the terms and conditions of employment are not central to the focus of the antitrust laws. Thus, this Court has recognized that, "[a]s a general matter, a union's primary goal * * * to enhance the earnings and improve the working conditions of its membership * * * is not necessarily served, and indeed may actually be harmed, by uninhibited competition among employers striving to reduce costs in order to obtain a competitive advantage over their rivals." *Associated Gen. Contractors*, 459 U.S. at 539. Instead, "a separate body of labor law" has been developed to assist unions in obtaining that goal on a level playing field. *Id.* at 539-540. As a result, as the Court observed, "a union,

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combination with business groups to restrain competition in marketing goods implicates Sherman Act concerns); *Hunt* v. *Crumboch*, 325 U.S. 821, 826 (1945) (dispute between union acting alone and employee does *not* implicate Sherman Act concerns); *Jewel Tea*, 381 U.S. at 690 n.5 (the "crucial determinant" in deciding whether antitrust immunity attaches is the "relative impact on the product market"); *Connell Constr. Co.* v. *Plumbers & Steamfitters Local No. 100*, 421 U.S. at 625-626 (union agreement that made non-union firms ineligible to compete for available work in particular market implicates Sherman Act concerns); *Associated Gen. Contractors of Cal.* v. *California State Council of Carpenters*, 459 U.S. 519, 540 (1983) (union does not allege injury of the type the Sherman Act was designed to forestall where its "labor-market interests * * * predominate"). This distinction has not been lost on the commentators. *See, e.g.*, Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 Yale L.J. 1, 26 (1971) ("The line the Court has consistently sought to draw [in determining whether the Sherman Act applies to arrangements arrived at through the collective bargaining process] is the line between the product market and the labor market"); Archibald Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 254 (1955) ("No one seriously suggests that the antitrust policy should be concerned with the labor market per se").

in its capacity as bargaining representative, will frequently not be a part of the class the Sherman Act was designed to protect, especially in disputes with employers with whom it bargains." *Id.* at 540.[10]

4. Finally, as detailed in Judge Winter's opinion for the Second Circuit in *National Basketball Association* v. *Williams*, 45 F.3d 684, 689-690 (2d Cir. 1995), *pet. for cert. pending*, No. 95-137, history suggests that Congress never intended the antitrust laws to be applied to multi-employer collective bargaining. The existence of multi-employer bargaining pre-dated (by a long shot) the passage of the Sherman Act in 1890. *See Employers' Associations, supra*, at 21-22. Yet, until recently, no one has seriously suggested that multi-employer bargaining is subject to the antitrust laws. *Williams*, 45 F.3d at 690. *Cf. Associated Gen. Contractors*, 459 U.S. at 539 ("Congress intended the [Sherman] Act to be construed in light of its common-law background").

As noted, moreover, Congress has considered and rejected proposals to restrict multi-employer bargaining. These proposals "were met with a storm of protest that their adoption would tend to weaken and not strengthen the process of collective bargaining and would conflict with the national labor policy of promoting industrial peace through collective bargaining." *Buffalo Linen*, 353 U.S. at 95. No one surmised that the proposals were somehow necessary to further national antitrust policy. And, as this Court has recognized, these events "cannot be said to indicate an intention [on Congress' part] to leave the resolution of [the fate of multi-employer bargaining] to future legislation." *Id.* at 95-96. Instead, the "compelling conclusion" is that Congress intended the

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[10] One leading commentator put it this way: "We may take it as a premise that the antitrust laws are not concerned with competition among laborers or with bargains over the price or supply of labor—its compensation or hours of service or the selection and tenure of employees." Archibald Cox, *supra*, at 255.

tradition of multi-employer bargaining to continue unabated subject to the existing ground rules. *Id. See Charles D. Bonanno Linen Serv.*, 454 U.S. at 409-410.

Petitioners' position in this case—that "Congress specifically intended employer associations to [be] subject to the antitrust laws," Pet. Br. at 15-16—simply cannot be squared with this history.

IV. WELL-ESTABLISHED CANONS OF STATUTORY CONSTRUCTION AND PRINCIPLES OF SOUND JUDICIAL DECISIONMAKING COMPEL THE CONCLUSION THAT MULTI-EMPLOYER BARGAINING GROUPS ARE IMMUNE FROM ANTITRUST LIABILITY FOR EXERCISING THEIR COLLECTIVE BARGAINING RIGHTS.

1. When faced with actual conflicts between the labor laws and the antitrust laws, this Court has sought to accommodate the policies underlying both statutes. *See, e.g., Connell Constr. Co.*, 421 U.S. at 622; *UMWA* v. *Pennington*, 381 U.S. 657, 666-668 (1965); *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. at 806-812.[11] As follows from the discussion in Parts II and III above, while subjecting multi-employer groups engaged in the exercise of their collective bargaining rights to antitrust liability would not materially advance antitrust policy, it would seriously undermine labor policy, particularly in the more typical industries such as construction in which multi-employer bargaining has proved to be a "vital factor" in fostering labor peace. *Buffalo Linen*, 353 U.S. at 95. A proper accommodation, therefore, requires that labor policy take precedence and that employers be shielded from antitrust liability for alleged restraints that affect only the labor market. This immunity must be broad enough to cover

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[11] Of course, there is no need for the Court to undertake an "accommodation" analysis in this case if it concludes, as it should, that Section 6 of the Clayton Act renders the antitrust laws inapplicable to restraints on competition in the labor market. *See supra* at 18-19 & n.8. That construction—based on the plain meaning of Section 6—eliminates any conflict here.

the entire collective bargaining process. Economic warfare is "part and parcel" of the collective bargaining process established by the labor laws. *NLRB* v. *Insurance Agents Int'l Union*, 361 U.S. at 489. Subjecting employers to antitrust liability for the exercise of some of their traditional weapons but not others would fundamentally disrupt the balance struck by Congress.

2. The long-standing policy of keeping the federal courts out of basic labor disputes should resolve any doubt that the balance in this case must be struck in favor of labor policy. Through both Section 20 of the Clayton Act (29 U.S.C. § 52) and the Norris-LaGuardia Act (29 U.S.C. §§ 101-115), Congress has evinced a clear intention of limiting judicial intervention into labor disputes. More to the point, "[w]hile the Norris-LaGuardia Act's bar [against] federal court labor injunctions is not explicitly phrased as an exemption from the antitrust laws, it has been interpreted broadly as a statement of congressional policy that the *courts must not use the antitrust laws as a vehicle to interfere in labor disputes.*" *H.A. Artists & Assocs.*, 451 U.S. at 714 (emphasis added). As Justice Goldberg put it in his *Jewel Tea* opinion, Congress, in enacting these laws, "intended to foreclose judges and juries from roaming at large in the area of collective bargaining * * * under cover of the antitrust laws." 381 U.S. at 716. As experience shows, the judiciary is simply ill-suited for such a venture. *See* Robert H. Bork, *The Antitrust Paradox* 83 (1978). Nevertheless, that is precisely what petitioners and their supporting amici invite here.

3. Other canons of statutory construction also support giving effect to the national labor policy here. For example, "it is a commonplace of statutory construction that the specific governs the general," *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (citation omitted), and that when two statutes conflict, the later in time should generally govern. *See Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974); 2B Norman J.

Singer, *Sutherland Statutory Construction* § 51.02 at 121 (5th ed. 1992). Both of these canons favor giving effect to the more specific and later-enacted national labor laws —which establish a clear policy of and framework for collective bargaining (*e.g.*, 29 U.S.C. §§ 151, 157, and 158(d)), recognize the existence of employer organizations (*see id.* §§ 104(b), 104(c), and 113(b)), and support an employer's right to unilaterally impose good faith bargaining proposals after impasse (*see supra* at 11)—over the earlier-enacted and more general Sherman Act, which broadly prohibits combinations in restraint of trade or commerce. 15 U.S.C. § 1. This conclusion is only strengthened by Section 6 of the Clayton Act (15 U.S.C. § 17), which unambiguously exempts restraints in "human labor" from the reach of the Sherman Act, and Congress' unequivocal rejection of proposals to limit multi-employer bargaining. *See supra* at 17-18, 21-22.

4. Principles of sound judicial decisionmaking also support affirmance of the decision below. One problem inherent in subjecting multi-employer bargaining units to liability under the antitrust laws is determining when that liability should attach. Even petitioners and their supporting amici are unable to agree on this fundamental point. Petitioners submit that *agreements* reached through multi-employer collective bargaining should be immune from antitrust liability, but that such immunity should lapse immediately upon expiration of the collective bargaining agreements. Pet. Br. at 45-46. As the government has observed, however, "[t]hat position cannot be reconciled with the obligation of employers under federal labor law to maintain the terms of employment established by an expired collective bargaining agreement until impasse." Gov't Br. at 16.

The government would extend antitrust immunity to the point of impasse—and, in some cases, beyond. Even following impasse, the government is forced to recognize that "[s]ome joint action by employers in a multi-

employer bargaining unit must, of course, fall within an implied exemption if the collective bargaining regime is to operate." *Id.* at 18 n.5. It will be up to the courts to determine under the government's multi-layer analysis whether antitrust liability has attached. That may be a straightforward determination in some cases; in others, it undoubtedly will not. The result will be uncertainty in an area in which multi-employer units—facing treble damages under the antitrust laws—simply cannot afford to "roll the dice" in deciding whether to exercise the full array of economic weapons available to them in the course of the collective bargaining process.

The decision below, in stark contrast, provides multi-employer bargaining units with meaningful guidance as to when antitrust liability will attach: multi-employer bargaining groups are immune from antitrust liability for exercising their collective bargaining rights as long as they do not restrain competition in a product market. *Cf. United States* v. *Topco Assocs.*, 405 U.S. 596, 609 n.10 (1972) ("Without the *per se* rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act"). *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989).

5. A final consideration supporting affirmance is the promotion of continuity and stability in the body of antitrust law. Reversal of the decision below would extend antitrust law to an entirely new and distinct factual context—the multi-employer collective bargaining process. This would have an unsettling effect on established antitrust jurisprudence. Forced to subject employers to treble damages under the antitrust laws for good faith actions taken in the course of the collective bargaining process, courts are likely to apply existing antitrust rules more restrictively. Over time, this will produce an anomalous body of antitrust jurisprudence, which, in turn, could have a leveling effect on the application of the antitrust

laws to the subject that is in fact central to antitrust policy—preventing restraints on competition in the *product* market.[12]

CONCLUSION

For the foregoing reasons, and those in respondents' brief, the judgment below should be affirmed.

Respectfully submitted,

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[12] *Cf. Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1989) ("To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech").